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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 528

FREDERICK P. WALL,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable Chief and Associate Justices of the Supreme Court of the United States:

The petitioner, Frederick P. Wall, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on November 12, 1954, and is not reported but is printed in the record filed on pages 267-268.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming said judgment was filed September 28, 1955, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the record.

JURISDICTION.

On October 20, 1955, the Court of Appeals entered an order denying the petition for rehearing filed by the petitioner; (this order appears in the Appendix). This petition is filed within thirty (30) days of the denial of petition for rehearing in the United States District Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. In a criminal prosecution, where intent is not an element of the offense charged, may the Government prove two similar offenses, not charged in the only count of the indictment upon which petitioner was tried?

2. Did the evidence of uncharged similar offenses presented to the jury in the same detail and with the same type and quantity of substantial support as the evidence introduced to prove the offense on trial, in effect, place the petitioner on trial for offenses not charged in the indictment?

3. May evidence of a disciplinary proceeding in the Post Office Department to which petitioner was not a party but which, in effect, tended to determine and to influence the ultimate issue of fact be introduced by the Government in petitioner's case?

STATUTE AND RULES INVOLVED.

The pertinent provision of the Criminal Code, and of the Federal Rules of Criminal Procedure involved are:

Section 215, Title 18, U. S. C. (prior to 1951 amendment).

Federal Rules of Criminal Procedure, Rule 39(b).

Federal Rules of Criminal Procedure, Rule 52(b).

STATEMENT OF THE CASE.

Petitioner was convicted, after a trial by jury, of receiving on February 14, 1950, for personal emolument, $400.00 from one Robert Birdsong in consideration of a promise of support and the use of influence in obtaining for the said Robert Birdsong an appointment to the position of Clerk in Charge in the United States Post Office at Chicago, Illinois (R. 267.)

The indictment returned by the Grand Jury consisted of two counts; the count on which the petitioner was convicted was Count 2. The first count charged the petitioner with receiving on November 26, 1949, for personal emolument, $400.00 from Elmer L. Beard in consideration of a promise of support and the use of influence in obtaining for Beard an appointment to the position of Assistant Superintendent in the United States Post Office at Chicago, Illinois (R. 3.)

On the day of trial, November 3, 1954, Count 1 was dismissed on the motion of the United States Attorney (R. 5), after two witnesses had testified, because the date alleged in Count 1 with respect to the commission of the crime was incorrect and the alleged crime was barred by the Statute of Limitations (R. 78-79.)

Elmer L. Beard, who was mentioned in Count 1 as the person who paid the petitioner $400.00 was, however, called as a witness for the Government apparently for the purpose of testifying to a similar transaction (R. 78.)

Robert Birdsong testified that he worked for the United States Post Office at Chicago, Illinois, and met the petitioner about December 1, 1949 at a banquet, at which time he made a tentative appointment to see petitioner at some fu-

ture time (R. 8.) The petitioner was Secretary to Congressman Dawson (R. 9.)

Shortly thereafter Birdsong called at the office of the petitioner and asked petitioner if he could get him promoted to a supervisory grade in the Chicago Post Office. Petitioner suggested that Birdsong get in touch with him at a later date. Some time in January, 1950, Birdsong asked Petitioner what had been done relative to the matter he was checking on, on the possibility of Birdsong's being promoted to supervisory grade, and petitioner advised that he had checked on it, that Birdsong had a good record and petitioner thought something could be done about it (R. 13.) Shortly thereafter, but prior to February 11, 1950 (R. 13), Birdsong asked petitioner what had developed in connection with his case and petitioner replied that he had been working on it and he thought "it could be done." Petitioner said it was going to be very difficult or very hard to do, but he believed it could be done. Birdsong asked petitioner "how much would it cost?" and petitioner replied "$400.00 is usually asked" (R. 14-15.)

A few days later, Birdsong brought $400.00 to the petitioner, who counted the money, put it in an envelope, and put Birdsong's name and telephone number thereon, and placed the same in his desk drawer (R. 14.) Two years later Birdsong was promoted, without an examination (R. 16.) Birdsong borrowed $300.00 of the money he testified paying to petitioner. He received no receipt for the money (R. 16.) At the time of his testimony he was no longer a Clerk in Charge having been reduced to a regular clerk. Objection was made to the reason for the reduction and the same was overruled (R. 16). Birdsong testified that the reason he was reduced was that the "Post Office Department sustained a charge against me of paying

$400.00." An objection to the answer was sustained, the answer was stricken, and the jury instructed to disregard it (R. 20.)

Government Witness Lowery testified that he was the manager of the Pacific Finance Loan Company and, by testimony and company records, corroborated the testimony of Birdsong that his company had made a loan to Birdsong in the sum of $300.00 on February 14, 1950 (R. 65-67).

Birdsong testified further that on March 4, 1950 he repaid the loan of $300.00 made on February 14, 1950, by "putting a small mortgage on his home of $1,200.00". Objection to that testimony was overruled (R. 77-78).

Over objection Government Witness Elmer L. Beard testified to an alleged transaction similar to the one testified to by Birdsong. Beard was the person named in the dismissed Count 1 of the indictment, who was alleged to have paid $400.00 to the petitioner for a promise of support and the use of influence in obtaining an appointment to a position in the United States Post Office.

Beard was employed in the United States Post Office in 1922 as a clerk; in 1926 he became a carrier; in 1942 he became a foreman; in July of 1949 he was promoted to assistant superintendent of a branch post office. His present position at the time of petitioner's trial was that of a foreman in the postal service (R. 95).

Over objection the witness testified that a foreman is a lower rated office than assistant superintendent and carries a less salary (R. 96). He met the petitioner in the middle of March, 1949, and over objection testified that he desired to be promoted to an assistant superintendent in one of the larger carrier stations. Petitioner replied that he was interested in promoting some qualified men to such positions and that he would try to help Beard (R. 97).

Beard further testified that at the next conversation he had with the petitioner, in the latter part of April 1949 (R. 97) Beard asked Wall if anything had been done as far as his promotion was concerned and Wall replied that such things take time. Beard asked if there was anything he could do to hasten the promotion and "How much would that be?" Wall replied $400.00 (R. 98). Beard borrowed $300.00 from the Commonwealth Loan company, raised $100.00 from his personal funds and paid the money to Wall on April 30, 1949 (R. 99-100). On July 1, 1949 Beard was advanced to the position of acting assistant superintendent (R. 100).

Charles W. Osborne was called to corroborate Beard's testimony with respect to loaning $300.00 from the Commonwealth Loan Company and produced exhibits to evidence the making of the loan, which were introduced in evidence (R. 125). The loan was renewed on November 6, 1949 and paid in full on January 2, 1952. A motion to strike the evidence of this witness was denied (R. 126).

Over objection, Government Witness Charles I. Stuart was permitted to testify to another alleged similar transaction. In January 1947 Stuart asked the petitioner if there was any possibility of getting a promotion in the post office and petitioner replied that he would have to see people (R. 134). About two years later, on June 15, 1949, Stuart asked the petitioner if he had been able to contact the persons who could assist Stuart in getting a promotion and told the petitioner that he understood in such cases, since petitioner was helping him, that the expense of entertainment and other things necessary in conferences should be "by all rights," borne by Stuart (R. 136). Petitioner said nothing and Stuart asked whether the sum of $300.00 would be sufficient for such purposes; petitioner still didn't say anything. Then Stuart said that he would make ar-

rangements to have that sum and petitioner said that might be enough (R. 137). On June 19, 1949 Stuart brought the money to Wall. Stuart did not get a promotion (R. 138). He borrowed the $300.00 from St. Edmund's Church Credit Union in the name of his wife. A motion to strike Stuart's testimony was denied (R. 139). Over objection, Ware Pendleton testified that he was the treasurer of Saint Edmund's Credit Union and that, on June 18, 1949, the credit union made a loan of $300.00 to Jean L. Stuart, wife of the witness, Charles I. Stuart (R. 161).

The petitioner testified that from 1948 to October 1952 he was secretary to Congressman William L. Dawson of the First Congressional District of Illinois (R. 201). He further testified that both the Congressman and he worked with the Chicago Postal Alliance to obtain promotions for negro employees of the post office. He also worked with National Association for the Advancement of Colored People for that purpose and also visited the Postmasters to intervene in behalf of a number of negroes. He denied doing any work for individuals as such and further, in substance, denied the testimony of Government Witnesses Birdsong, Beard and Stuart. He denied receiving money from any of them (R. 201-221).

REASONS FOR GRANTING THE WRIT.

The importance of Fred P. Wall's conviction being permitted to stand affirmed by the United States Court of Appeals for the Seventh Circuit transcends nine months imprisonment and a fine of $1,000.00. In addition to his position as secretary to Congressman Dawson petitioner had been associated for a period of many years with a number of civic and political organizations concerned with the betterment of the negro people in Chicago (R. 176-177; 188; 197; 203-206; 212; 217-218).

Until the incident involved in this cause there was no question as to petitioner's standing in the community; lawyers, clergymen, and various public officials, both white and negro, testified to this fact (R. 170; 180-200). Destruction of this career with its obvious ill effect upon Mr. Wall's people is inherent in this conviction. These circumstances make it most imperative that the proceedings terminating in that conviction be marked by a rigid adherence to the highest standards of criminal justice. The record in this case falls short of these requirements in at least three respects which because of their general applicability to the administration of criminal justice would warrant attention by this Court without regard to the context in which they arose. These circumstances are:

(1) Evidence of the commission of similar offenses, for which petitioner had not been convicted and which were not charged in the indictment, was introduced.

(2) Not only was such evidence of similar offenses introduced but it was detailed and corroborated to exactly the same extent as the evidence tending to support the indictment upon which Mr. Wall stood trial, thus requiring him to prepare to defend himself against these accusations, of which he could have had no prior knowledge, during the course of trial.

(3) In two instances, the trial judge permitted evidence of a Government disciplinary proceeding, to which Mr. Wall was not a party, to creep into the record without declaring a mistrial thereon (R. 16; 95-96).

I.

Petitioner was convicted of violation of Title 18 U.S.C.A. Section 215, which makes it an offense to receive any money as a political contribution or for personal emolument in consideration of the promise of support or the use of in-

fluence to obtain for any person an appointive office or place under the United States. This section obviously requires no proof of criminal intent. The elements of this offense are clearly stated. There is no claim by Mr. Wall that he did not endeavor to use whatever influence was available to him to obtain promotions for qualified negroes in the Post Office Department. As a matter of fact Mr. Wall testified that his first contact with the Witness Birdsong was as a member of a group known as the National Postal Alliance which was specifically interested in obtaining such promotions (R. 202-205). Moreover, petitioner testified that he had prepared a letter to the Postmaster on behalf of Mr. Birdsong at the request of his employer and upon the basis of letters written to Congressman Dawson and requesting such assistance from Mr. Birdsong (R. 208-211; 230; 237-238). The only element in conflict was that Mr. Wall received any money from Mr. Birdsong; this Mr. Wall indignantly denied (R. 208-209).

The evidence with respect to this issue consisted merely of Birdsong's testimony corroborated by evidence that he had borrowed the sum of $300.00 at the time of the alleged payment (R. 15-16; 65-68). To bolster this case the Government was also permitted to introduce evidence with respect to similar payments to petitioner by Charles I. Stuart (R. 137-139; 161) and Elmer L. Beard (R. 98-100).

The Court of Appeals held that this evidence was properly admitted because it tended to show that petitioner had an "established plan of doing business in the selling of his influence" and that it tended to corroborate or supplement the direct evidence with respect to the price of $400.00.

This decision conflicts with many decisions of the Courts of Appeals for various circuits. In the recent case of *Hartman* v. *United States*, 215 F. (2d) 386, 393 (C.A. 8th, 1954), the defendant was accused of tax fraud in filing his income

tax returns for the years 1945 and 1946. In each count the indictment charged a failure to report specific taxable items. A finding of guilty on both counts was reversed and remanded because the Government introduced evidence with respect to a family partnership organized by the defendant for an allegedly fraudulent purpose and further introduced the opinion of the government agent who investigated the case that the defendant had received unreported income in 1946 in addition to the items specifically charged in Count 2 of the indictment. The Court commented upon the fact that the effect of such evidence was to obscure the issue and permit conviction upon the alleged general character of the defendant as a tax dodger. The Court specifically rejected the contention that such evidence would be admissible to prove intent because it was not "of such a character that as a matter of logic . . . (it) . . . tended to determine a criminal intent in the acts within the charge."

In an extremely parallel case, *United States* v. *Klass*, 166 F. 2d 373, 377-8 (C.A. 3, 1948), a conviction for violation of maximum price regulations by selling a specified dwelling for $1,500.00 over the ceiling price was reversed because the Government introduced evidence of other sales for more than the ceiling price. The Court pointed out that criminal intent was not an element of proof in a prosecution for violation of a price regulation and that more than mere similarity was required to make such evidence admissible to prove a plan or scheme. The Court quoted from Wigmore on Evidence (3rd Ed.), page 202, as follows: "The added element, then, must be, not merely a similarity in the result, but such a concurrence of common features that the various acts will need to be explained as caused by a general plan of which they are the individual manifestations". In this case, coincidence in price, the feature seized upon by the trial Court of Appeals with respect to petitioner, was completely disregarded.

Again identical transactions with respect to individual crimes have been held inadmissible in the case of *Lovely* v. *United States,* 169 F. 2d 386, 388-391 (C.A. 4, 1948). In the *Lovely* case the defendant was accused of having taken the prosecutrix to the Fort Jackson, North Carolina, Officers' Club and then, after considerable drinking, to a lonely point on the military reservation where he raped her. The defendant admitted that he had intercourse at the time and place mentioned but testified that it was with the consent of the prosecutrix. Allegedly to show a common plan or design, the Government was permitted to introduce evidence of an alleged rape not charged in the indictment which had occurred under identical circumstances about fifteen days prior to the offense for which the defendant was on trial. The Court pointed out at Page 388 that such evidence was not admissible where its only probative value is to show a tendency or likelihood of the defendant to commit such a crime.

Again in *Railton* v. *United States,* 127 F. 2d 691, 693 (C.A. 5, 1942), it was held that it was erroneous to permit a witness to testify that he had engaged with the defendant in fraudulent schemes to defraud a municipality where, in a prosecution for conspiracy to steal Government property the only issue was whether the defendant was a party to the stealing and the proof of this fact depended upon the credibility of the witness for the prosecution and the defendant. The Court specifically said that where the only issue is the credibility of the witnesses such evidence is prejudicial (page 692) and continued, at page 693: "Nor is there any peculiarity of method which might identify him (the defendant) as a perpetrator which is the usual ground of admitting other transactions of which the accused is clearly or admittedly guilty as showing system."

In *Kemp* v. *United States,* 151 F. 2d 680, 687-9 (C.A. 8, 1945), the defendant was on trial on four counts of violation of a rationing order by selling gasoline at over-ceiling prices and failing to collect ration coupons therefor. The witness was permitted to testify as to sales on other dates prior to those involved in the indictment both to himself and to other parties. The Court held that since intent was not an element of ration violation there was no necessity for such evidence and commented, at page 688, "The fact that the other offenses were of a like nature and were offenses against the same statute was not competent to prove that the defendant committed the acts charged in the indictment."

The case of *Hubby* v. *United States,* 150 F. 2d 165, 167 (C.A. 5, 1945), involved indictments for concealing and selling narcotics on October 27 and December 12, 1944. The evidence to support each indictment consisted of purchases by an informer and a government agent. A verdict of not guilty was returned on all but the first count, which charged the defendant with concealing narcotics on October 27. On appeal the admission of evidence of similar transactions on December 20 and 21 was claimed to be error. This evidence had been admitted in the Court below to show system and intent. On review the conviction was reversed and remanded because it was held that this evidence cannot be used to explain and strengthen the evidence used to prove the substantive offense. At page 169, the Court of Appeals pointed out that neither system nor intent was an element of the offense charged. This is also true of the instant case. As in the *Hubby* case, petitioner could have been charged with a continuous scheme to obtain money for the use of his political influence. The fact is, however, that he was charged only with obtaining $400.00 from Robert Birdsong, just as the defendant in the *Hubby*

case was charged only with concealing narcotics on October 27. There can be no logical basis of reconciliation between the two decisions.

The decision of the Court of Appeals in the instant case is clearly in irreconcilable conflict with the decisions cited above which hold, in essence, that mere similarity of acts is not sufficient to prove that they were performed pursuant to a common plan or design, particularly when the uncharged acts sought to be proved are not acts which the defendant has been clearly or admittedly shown to have committed.

It is likewise in conflict with these decisions in permitting such testimony where intent is not involved and where the only question to be answered in determining the guilt or innocence is what witness or witnesses are the more credible.

In reaching this conclusion, the Court of Appeals relied upon decision in *Bracey* v. *United States,* 142 F. 2d 85 (C.A.D.C. 1944), in which the defendant was convicted of "carnally knowing and abusing a twelve year old girl." The evidence challenged in that case involved similar acts between the defendant and the child in question two or three nights prior. The specific exemption relied upon by the Court in this case is explained at Page 88 where the Court says: "The showing of similar acts with respect to abnormal sex offenses shows an emotional predisposition and is therefore admissible as showing a peculiar warped personality." The narrow nature of this exception is well recognized in the *Lovely* case previously cited. In that case the Court commented that the exception should not apply to rape where the issue was merely the factual question of consent, but was perfectly proper in a case such as the *Bracey* case where sexual abnormality and perversion was involved.

The Court likewise relied upon *United States* v. *Crowe*, 188 F. 2d 209 (C.A. 7, 1951). The *Crowe* case involved a conspiracy to possess and circulate counterfeit bills. The evidence in question there concerned the distribution of counterfeit currency at times not specifically charged in the counts of the indictment charging possession and passing of counterfeit bills. The distinction between a case charging conspiracy in the indictment and the instant case is obvious.

Likewise the Court of Appeals relied upon a so-called cooperation citing *Schwartz* v. *United States*, 160 F. 2d 718 (C.A. 9, 1947). In this case, the defendant was charged with two separate mail robberies. The only evidence with respect to the two offenses was the testimony of an informer concerning a conversation he had had with the appellant. The trial court very carefully permitted only those portions of the conversation relating to the crime on trial to be introduced and the objection raised was purely upon the basis that terminology such as "first job" and other similar language was used in recounting these conversations. The Court clearly held in that case that the particulars could not be disclosed but that the evidence of the crime on trial was so intermingled in the conversation that under the very stringent caution observed by the trial judge its admission was not error.

In the case at bar the evidence of the offenses was entirely separate, being furnished by different witnesses in each instance; thus the authority relied upon by the Court of Appeals in this instance has no applicability to the facts.

The foregoing discussion should amply demonstrate that there is an irreconcilable conflict between the decision of the Circuit Court of Appeals for the Seventh Circuit in the instant case and the decisions of the Courts of Appeals for other circuits previously cited. Moreover the decision

in the instant case is probably in conflict with the applicable decisions of this Court in *Boyd* v. *United States,* 142 U.S. 450, 12 S. Ct. 292, 35 L. Ed. 1077, in which a conviction for murder during the course of a robbery was reversed for error in introducing evidence of earlier robberies committed by the defendant and *Bird* v. *United States,* 180 U.S. 356, 21 S. Ct. 403, 45 L. Ed. 570, in which evidence of prior assaults, unaccompanied by batteries, both prior and subsequent to the event in question, were held improperly admitted in a murder prosecution. Since the decisions of this Court in the *Boyd* and *Bird* cases a number of ramifications of the rule as to the admissibility of other offenses have been developed in many decisions of the Courts of Appeals in addition to those cited here as being most directly in conflict with the decision in the instant case.

The scope of the confusion surrounding this rule is well evidenced by Stone, "*The Rule of Exclusion of Similar Fact Evidence*" *America* 51 Harvard Law Rev. 988-1038.

As can be seen from the foregoing cases, the scope of the rule and its reasons has become even more confused since the date of Professor Stone's article. A review of the rule by this Court at this time would serve the purpose advocated by Professor Stone at Page 1036 of his article by tending, at least so far as the Federal Courts are concerned, to make a clear, rational and definite choice as to the principle to be involved. The importance of the scope and limits of this rule to the defendant in any criminal case which may come before the bar in the future is obvious. Certainly such defendant should know under what circumstances he may be faced with this devastating type of evidence, the consequences of which are well described by the late Mr. Justice Harlan, speaking for the majority in the *Boyd* case, at Page 458 of the opinion, as follows:

"Those robberies (the ones not involved in the indictment as to which evidence was offered) may have been committed by the defendants in March and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community and who are not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death."

Surely the instant case represents a deviation from the strict care exercised by other Circuits which should not be permitted to remain upon the books as the law of the Seventh Circuit and precedent for other courts. This existing serious conflict should be resolved and the entire problem of this type of evidence authoritatively reviewed by this Court in the exercise of its power to regulate the conduct of proceedings in the lower Federal Courts.

II.

Although petitioner maintains that the evidence of the Witnesses Beard and Stuart was inadmissible in this cause, further error, requiring the attention of this Court in the interests of the fair and impartial administration of justice, was committed in the extent to which these witnesses were permitted to testify and the extent to which the Government was permitted to introduce substantial evidence of loans to corroborate their testimony. The only count considered at the trial of this cause charged petitioner with receiving $400.00 from Robert Birdsong (R. 4). Robert Birdsong's testimony appears at Pages 7 to 64 of the transcript. In it he describes in detail his meetings with the petitioner and the manner in which he obtained and repaid the money which he allegedly gave to petitioner.

To corroborate Mr. Birdsong's testimony the Government offered the Witness Lowery, for the purpose of proving that such a loan was actually made to Mr. Birdsong (R. 65-68).

The evidence of similar offenses was contained in the testimony of the Witnesses Beard and Stuart, each of whom testified that he had given money to petitioner in consideration of petitioner's promise of support and the use of influence in obtaining a promotion in the United States Post Office. The testimony of Mr. Beard appears at Pages 78 and 94 through 103 of the printed record and the testimony of Stuart appears at pages 129 through 160. A comparison of their testimony with that of Mr. Birdsong will indicate that each of them was permitted to testify to various encounters with the petitioner, to their status and careers in the Post Office Department and to the manner in which they obtained the money allegedly given petitioner with the same minutiae as Mr. Birdsong testified. Moreover, testimony of the Witness Osborne (R. 124-129) was offered solely for the purpose of corroborating the testimony of the Witness Beard as to how he obtained the money and the testimony of the Witness Pendleton (R. 160-167) served the same purpose with respect to the Witness Stuart; in fact, the only difference in the testimony of Birdsong, Beard and Stuart is that Stuart did not ultimately receive a promotion in the Post Office Department (R. 138). There was no difference in the quantity of proof or its details with respect to the offenses for which petitioner was on trial and the other two allegedly similar offenses. As a matter of fact, it is clear from the instructions of the trial court that even the court believed petitioner was being tried for each of the three offenses. At Page 255 of the record the court instructed as follows: "Such evidence, if believed by you, may be considered as tending to establish a common scheme or common purpose, so associated that proof of one tends to prove the other."

Moreover, the court gave an instruction which was unnecessary except in relation to the Witness Stuart. At Page 256 of the transcript, the court said: "Now the gist of this offense is the receipt of personal emolument, money, or something of value, in consideration of the promise of support or use of influence. *It is not necessary for the Government to prove that the promise was carried out.* (Emphasis supplied). The italicized portion of this charge was not necessary with respect to either Birdsong or Beard, since assuming the testimony of the Government to be true, the testimony of these witnesses proved some undertaking by petitioner and resultant promotions for these two witnesses. It was only with respect to the Witness Stuart that there was no proof of the promise being carried out.

The question as thus presented by this record is whether evidence of similar offenses, if admissible at all, can be admitted in such detail that it has the effect of placing the defendant on trial for separate offenses, not charged in the indictment and for which he has had no opportunity to prepare a defense.

There are no federal authorities directly bearing upon this point. A conflict in principle does exist with the decision of the Court of Appeals for the Ninth Circuit in the case of *Schwartz* v. *United States,* 160 F. 2d 718 (C.A. 9, 1947). In that case the Court held that the evidence of a similar offense was restricted to its bare essentials and therefore, under the non-analogous circumstances, admissible. This clearly implies that a contrary result would have been reached in the instant case even had the testimony of Beard and Stuart been admissible at all.

Although, under Rule 26 of the Rules of Criminal Procedure for the United States District Court, the admissibility of evidence is governed by the principles of common

law as they may be interpreted by the courts of the United States in the light of reason and experience, the analogous decisions of the state courts, in identical situations and declaratory of the common law as applied in state courts should be persuasive. Proof of other offenses in the same measure and detail as the crime charged in the indictment has been condemned by the Supreme Court of Illinois in *People* v. *Paisley,* 288 Ill. 310, 322. A number of Illinois decisions have pointed out that to permit proof of the details of similar offenses actually tries a defendant for additional crimes; *People* v. *Durkin,* 330 Ill. 394, 404; *People* v. *Spaulding,* 309 Ill. 292-304; *People* v. *Hobbs,* 297 Ill. 399, 411; *People* v. *Cione,* 293 Ill. 322-334; *People* v. *King,* 276 Ill. 138-148.

As is clear from the authorities cited in the previous section of these reasons, the danger in permitting the introduction of evidence of similar offenses is that a jury will be confused over the multiplicity of issues and convict, by applying the general principle, "Where there is smoke, there's fire." Increased detail can only aggravate this tendency. Therefore, this Court, in the exercise of its supervisory power, should grant the writ prayed for in this case in order to authoritatively determine the limits to which the Government may go in proving the details of similar offenses.

III.

Petitioner was further prejudiced by the fact that the trial judge failed, *sua sponte,* to direct the withdrawal of a juror after the jury was permitted to learn that the Post Office Department had, in a disciplinary proceeding to which petitioner was not a party, found, in effect, that Birdsong had given petitioner $400 to use his influence to secure a promotion for Birdsong. At page 16 of the

record, Birdsong was permitted to testify that he knew why he was reduced in rank in the Post Office Department. Birdsong, having just narrated his version of the alleged payment of $400 to petitioner, stated, "The Post Office Department sustained a charge against me of paying $400." Although the trial court sustained an objection to this evidence, the prejudice was not cured by the instruction to the jury to disregard this testimony, particularly where, subsequently, the witness, Beard, was permitted to testify to facts from which the jury could infer that the same procedure had taken place in his case (R. 95-96).

The net effect of this testimony was that evidence which showed that a responsible government agency, with a record for fairness and impartiality in such matters, had determined the ultimate issue in this case, the payment by Birdsong of $400 to petitioner, in a manner adverse to petitioner. What they could not know was that such determination was in a proceeding to which petitioner was not a party.

In *United States* v. *Sprengel*, 103 F. (2d) 876, 883 (C.A. 3rd, 1939) the defendants were charged with conspiracy to use the mails to defraud in connection with the so-called "Baker Estate" swindle which consisted of soliciting claimants to a share in this estate. Two separate groups of conspirators had been engaged in this activity, and the Court of Appeals reversed the conviction of the conspirator in that case because the U.S. Attorney asked the witness if he had ever heard of one of the other conspirators, and, upon being told that the witness had read the other group in the newspaper, remarked that the newspaper article was in connection with the proceedings in which the other conspirators had been sent to jail. The court stated that the introduction of the outcome of litigation involving the same issues to which the defendant was not a party was plain error.

Although the prejudicial character of this evidence was not argued in the Court of Appeals in this case, nevertheless this Court, along with any other appellate tribunals in the Federal system has power, as described in Rule 52(b) of the Rules of Criminal Procedure, to note plain error in the record for the purpose of preventing injury to substantial rights, taking cognizance of unusual circumstances, and protecting the public interest in the administration of justice, *United States* v. *Levi*, 177 F. (2d) 827, 831 (C.A. 7th, 1949) and *United States* v. *Raub*, 177 F. (2d) 312, 316 (C.A. 7th, 1949), *cf. Brasfield* v. *United States*, 272 U.S. 488. Although not associated with this cause prior to the preparation of the instant petition, counsel felt compelled to ask this Court to exercise this power to note plain error with respect to the evidence of the Post Office Department's determination of the only ultimate issue in this case because of the substantial perversion of justice which may occur through the failure to place government counsel on notice that attempts to introduce evidence of this nature should, and will, only result in a mistrial.

CONCLUSION.

Far more than nine months imprisonment is involved in this case. Petitioner's usefulness in the movement to secure more equal treatment for negroes in Chicago has been impaired and aspersions cast upon that movement itself by this conviction. Had this result been obtained in a fair and impartial trial it would have been unfortunate; the fact that it was obtained by the use of prejudicial tactics renders it more serious. The questions as to the admissibility of similar offenses and as to the effect of evidence of the determination by quasi-judicial agencies of the Federal Government of the ultimate issue of a case in proceedings not involving the defendant, are questions which

can and do arise frequently in criminal proceedings. Each time they arise, the *Wall* case, if unreviewed, will stand as precedent for divergent rules which are contrary to the highest standards of fair administration of justice.

To remove the uncertainty and conflict and establish a fair and uniform rule governing these situations, this cause should be reviewed by this Court.

Wherefore, petitioner prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above captioned cause and that, upon such review, the judgment of the Court of Appeals be reversed and the cause remanded.

Respectfully submitted,

MYER H. GLADSTONE
Attorney for Petitioner.

APPENDIX.

OPINION.

Before DUFFY, *Chief Judge*, FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Defendant seeks by this appeal a reversal of the district court's judgment convicting him, upon the verdict of a jury which found him guilty of receiving "for personal emolument money, to wit, $400.00, from one Robert Birdsong in consideration of a promise of support and the use of influence in obtaining for the said Robert Birdsong an appointment to the position of Clerk in Charge in the United States Post Office at Chicago, Illinois, an appointive office and place under the United States," in violation of Section 215, Title 18, U. S. C. A.

Defendant relies in this court on the following alleged errors in the district court: (1) The admission of evidence of other alleged offenses wholly independent of the offense charged, (2) failure to grant defendant's motion for acquittal at the conclusion of all the evidence, and (3) failure to quash the indictment.

To the extent that they are pertinent to the alleged errors, the facts which the evidence tended to prove we now set forth.

Robert Birdsong, testifying for the government, said that in December 1949 he talked to defendant, whom he knew to be a congressman's secretary, at the defendant's office in Chicago, and asked defendant if he could help him get promoted to a supervisory grade at the Chicago post office. Defendant said he would check into the matter

and suggested Birdsong get in touch with him at a later date. Early in January 1950, by telephone appointment, he saw defendant again, at which time defendant said that he had checked and found Birdsong had a good record and he thought something could be done about it.

Prior to February 11, 1950, and several weeks after the last meeting just mentioned, defendant at his office told Birdsong that he had been working on his case and he thought it could be done, although it would be very difficult.

Pursuant to defendant's instructions, Birdsong saw defendant at his office again on February 11, 1950, when he asked if there were any new developments. Defendant told him it could be done, although very difficult to do. Birdsong asked defendant "how much would it take" and defendant said "$400.00 is usually asked" and "$400.00 is the usual amount". Birdsong asked "if he would take a check". Defendant replied, "Are you kidding?" Birdsong said he would bring the money the following week.

On February 14, 1950, at the same office, Birdsong told defendant that he had brought the money and thereupon produced it in an assortment of bills. Defendant counted them, put the money in an envelope, put Birdsong's name and telephone number on the envelope and placed it in his desk drawer, saying to Birdsong "that he keeps his word". Birdsong borrowed $300 on an automobile loan and used $100 of his own money in making up the $400 paid to defendant. The loan was made on the morning of the day that he gave the money to defendant. Defendant gave Birdsong no receipt for the money. Almost two years later, Birdsong was promoted, without taking an examination.

Fred A. Haase was then in charge of the postmaster and executive files in the postmaster's office in Chicago and he saw defendant in that office a number of times.

Defendant talked to Haase on many occasions, one of the subjects being in reference to complaints made against certain employees.

Elmer L. Beard, a postal employee, in March 1949 talked with defendant concerning a promotion, and in April, 1949 he asked defendant if anything had been done in behalf of his promotion. Defendant said that to hasten the promotion would cost $400. On April 30, 1949, he gave $400 to defendant at his office and he was promoted to assistant superintendent on July 1, 1949.

Charles I. Stuart, a post office clerk, was told by defendant on June 15, 1949 that he had found someone who would enter a plea for promotion for Stuart. Stuart delivered $300 to defendant on June 19, 1949. He did not receive a promotion.

1. The general rule is that, upon the trial of an accused person, evidence of another offense, wholly independent of the one charged is inadmissible. This rule is, however, subject to some well established exceptions. In *Bracey* v. *United States,* 142 F. 2d 85, at 87, the court said:

> "However, there are many well established exceptions to this rule, raised by the special circumstances of particular cases; to the end that all relevant facts and circumstances tending to establish any of the constituent elements of the crime of which the defendant is accused may be made to appear. Thus, evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof; or tends logically to prove any element of the crime charged. Such evidence is admissible if it is so related to or connected with the crime charged as to establish a common scheme or purpose so associated that proof of one tends to prove the other, or if both are connected with a single purpose and in pursuance

> of a single object; as well as to establish identity, guilty knowledge, intent and motive."

To the same effect is *United States* v. *Crowe,* 188 F. 2d 209, at 212.

The testimony of Beard and Stuart tended to show that defendant's promise to use his influence to procure promotions for postal employees was customarily based upon the payment of money to him and that he had an established plan of doing business in the selling of his influence. For that reason this evidence falls within the exception to the general rule and its admission was not error.

Moreover, the testimony of Beard and Stuart was corroborative of Birdsong's testimony that defendant told him that $400 was usually asked and $400 was the usual amount. The general rule of exclusion is also subject to an exception in a case in which the evidence offered has a tendency to corroborate or supplement direct evidence. *Hass* v. *United States,* 31 F. 2d 13, 15, certiorari denied 279 U. S. 865; *Schwartz* v. *United States,* 160 F. 2d 718; and 22 C. J. S. 1092, note 66.

The evidence indicating that Birdsong obtained through a loan a part of the money which he paid on the same day to defendant, was likewise admissible as tending to corroborate Birdsong's testimony to that effect.

2. In view of the evidence tending to prove the facts above set forth, we believe that it was not error to overrule defendant's motions for acquittal. The evidence was sufficient to support the verdict of the jury.

Upon the oral argument before this court, defendant's counsel argued specifically that there was a failure of proof that the money paid to defendant by Birdsong was for the defendant's "personal emolument," within the

meaning of the act[1]. There was evidence, as above pointed out, that the money was paid personally by Birdsong to the defendant. There is no evidence that he was to turn the money over to any other person or that he did so. It was not required that the government prove such a negative fact. The jury by its verdict indicated that they believed defendant received the money for his personal emolument. The record supports that belief.

3. Defendant's motion to quash the indictment, which was overruled, was based upon the contention that the statute under which he was convicted[2] does not relate to promotions, as distinguished from an original appointment to an office or place under the United States.

We considered this same contention in *United States* v. *Echeles*, 222 F. 2d 144, where we held to the contrary.

It is significant that the evidence shows that the promotion which Birdsong sought and obtained did not require him to take an examination. In other words, the promotion involved merely the designation of Birdsong. This is an appointment within the meaning of the act.

In *United States* v. *Jacobs*, (Ill.) 116 F. Supp. 928, at 929, the court persuasively analyzed the same contention as defendant makes in this case:

> "From a reading of the defendant's brief, he would have the Court construe the Act which would so limit its scope as to provide only for the original induction of persons into the Federal service, by improper influence, and not to the promotion of persons already in the employ of the Government. Congress, it ap-

[1] 18 U. S. C. A. § 215.

[2] "Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both." 18 U. S. C. A. § 215.

pears from the wording of this statute, was attempting to outlaw all improper tampering with Government employment. The vicious effect would be the same whether the person involved was already in the service or was being brought in.

Black's Law Dictionary, at page 128, defines the word 'appoint' as meaning 'to designate, ordain, prescribe, nominate.' Certainly the word 'appointive' is comprehensive enough to encompass 'promotion'. The position involved in this indictment was that of Foreman in the United States Post Office at Chicago, Illinois. When a choice of one of three candidates to the position of foreman is made, it is just as necessary for Government efficiency that absolute honesty prevail in that choice as when an original selection is made from a wider field of applicants. There is still the element of selectivity which makes the choice a designation or an 'appointment'."

Section 215 in 1948 for the first time incorporated into the act the words "or place" after the words "any appointive office"[3]. If we agree with defendant's contention, *arguendo,* that the word "appointive" has a technical and restricted meaning when used with the word office, that contention falls when the word "place" is added and used conjunctively with "office". "Place" would include, in the broadest way, the relation of an employee to the government, such as janitors, typists, etc. The inclusion of "or place" by congress indicates that the word "appointive" is used synonymously with the word "designative."

We believe that the act under which the prosecution in the case at bar occurs was intended by congress to prohibit the sale of influence in procuring promotions in the government service as well as original appointments thereto. It is more reasonable to assume that congress was attempting to reach both situations. The court did not err in refusing to quash the indictment.

---

[3] 18 U. S. C. A. § 215.

For the reasons hereinbefore set forth, the judgment of the district court is affirmed.

Judge FINNEGAN concurs in the result.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND ORDERS OF COURT OF APPEALS.

Judgment, entered September 28, 1955, affirming judgment of District Court.

Order, entered October 20, 1955, denying petition for rehearing.

Certificate of Clerk of Court of Appeals for the Seventh Circuit, dated November 8, 1955.

STATUTES AND RULES INVOLVED.

Title 18 U.S.C.A. Section 215. Acceptance or solicitation to obtain appointive public office:

"Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Rule 39. Supervision of Appeal:

"(a) Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules."

Rule 52. Harmless Error and Plain Error:

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 528

FREDERICK P. WALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 25-31) is reported at 225 F. 2d 905.

JURISDICTION

The judgment of the Court of Appeals was entered on September 28, 1955, and a petition for rehearing was denied on October 20, 1955. The petition for a writ of certiorari was filed on November 19, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to admit evidence of crimes other than that for which petitioner was indicted to show petitioner's method of operation.

2. Whether such evidence was unduly emphasized at the trial.

3. Whether the trial court committed plain error by instructing the jury to disregard testimony concerning a disciplinary proceeding to which petitioner was not a party, instead of declaring a mistrial thereon.

STATUTE INVOLVED

18 U.S.C. 215:

> ACCEPTANCE OR SOLICITATION TO OBTAIN APPOINTIVE PUBLIC OFFICE.
>
> Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Illinois of receiving money for personal emolument in consideration of his promise to use his influence in obtaining for one Robert Birdsong an appointive

office under the United States. 18 U.S.C. 215. He was sentenced to pay a fine of $1,000 and to serve a term of nine months in prison. (R. 267-268.) On appeal the conviction was unanimously affirmed (Pet. App. 31).

The indictment (R. 3-4) consisted of two counts. Count 1 was dismissed on the motion of the United States Attorney (R. 5) because prosecution for the crime was barred under the statute of limitations (R. 78-79). Count 2, on which the petitioner was convicted, charged him with receiving, for personal emolument, $400 from Robert Birdsong on February 14, 1950, in consideration of a promise to use his influence in obtaining for Birdsong an appointment to the position of Clerk in Charge in the United States Post Office, Chicago, Illinois (R. 4).

The evidence adduced at the trial may be summarized in pertinent part as follows:

Witness Birdsong testified that he was an employee of the United States Post Office in Chicago, Illinois, and that he met petitioner about December 1, 1949, when petitioner was secretary to Congressman Dawson (R. 9). Birdsong several times solicited petitioner's aid in obtaining a promotion to a supervisory grade in the United States Post Office (R. 12-14). About February 11, 1950, Birdsong again visited petitioner to inquire about his promotion and upon being told that he thought it could be done, Birdsong asked "how much would it take?", to which petitioner replied, "$400 is usually asked". Birdsong asked petitioner if he would take a check and petitioner replied, "Are

you kidding?" (R. 14-15.) On February 14, 1950, Birdsong gave petitioner $400 in cash. Petitioner put it in his desk drawer assuring Birdsong that he would keep his word (R. 15-16). Birdsong was promoted to the position of Clerk in Charge two years later without taking an examination (R. 16).

Birdsong testified that he had been reduced to the grade of a regular clerk before the trial (R. 16). Over objection, he was permitted to answer why he was reduced in rank, but when he testified, "The Post Office Department sustained a charge against me of paying $400", the court sustained an objection to the answer, had it stricken and instructed the jury to disregard it (R. 17).

Government witness Elmer L. Beard testified to a transaction almost identical to the one testified to by Birdsong (R. 94-101). Beard was the person named in the dismissed Count 1 of the indictment. The testimony was admitted on the ground that it tended to show "purpose, knowledge or design" (R. 91-93).

Beard testified that he gave petitioner $400 shortly after April 30, 1949, to "hasten" his promotion to assistant superintendent of a branch post office. On July 1, 1949, Beard was advanced to the position of acting assistant superintendent (R. 100). He further testified that at the time of petitioner's trial he was a foreman in the postal service, a lower rated office than assistant superintendent (R. 95-96). Beard secured a loan of $300 on April 30, 1949, according to his own testimony (R. 99) and that of the manager of a loan company (R. 125-126).

Government witness Charles I. Stuart testified that he gave petitioner $300 on June 19, 1949 (R. 137), to secure a promotion in the post office. Petitioner said he did not know, but "imagined" that sum would be enough. However, Stuart did not get a promotion. (R. 138.) Stuart testified that he borrowed the money in the name of his wife on June 18, 1949 (R. 139), and that testimony was corroborated by the treasurer of a credit union (R. 161).

ARGUMENT

1. Asserting that intent is not an element of the crime for which he was charged, petitioner contends (Pet. 2, 9) that it was error to permit the introduction of evidence of two crimes of a similar character for which he was not on trial. The initial premise of the argument is wrong since it is manifest that intent is an element of the crime in that the purpose for which petitioner received the money had to be established. Furthermore, aside from the issue of intent, the evidence was properly received to establish a common scheme so associated with the crime charged that proof of the other offenses tended to prove the crime. All of the evidence was logically connected with the act charged, since evidence of the other payments tended to show petitioner's purpose in receiving the money from Birdsong and his method of operation, including the fact that, as he told Birdsong, "$400 is the usual amount" (R. 44). The jury was properly instructed as to the purpose for which the evidence of other offenses had been admitted (R. 255).

The general principle, that evidence of other crimes is admissible to show intent, purpose or plan of operation, is recognized throughout the federal courts,[1] including the very cases which petitioner cites as being in conflict with the decision below(Pet. 10-16). It is also recognized in all cases, including those relied on in the opinion below (Pet. 10-16). It is also recognized in all here involved, that the application of that general principle to the special facts of a particular case cannot be done mechanically, but calls for the exercise of judgment on the part of the trial court. See *Glasser* v. *United States,* 315 U.S. 60, 81. In making that determination, a trial court must consider a number of factors, such as the nature of the offense charged, the logical relevance of the disputed evidence, the possibility that the additional evidence may be so prejudicial as to warrant its exclusion even though relevant. See, for example, *Bird* v. *United States,* 180 U.S. 356, 359-361; *Moore* v. *United States,* 150 U.S. 57, 60-61. For this reason, the cases cited by petitioner (Pet. 10-16) dealing with different crimes proved by different facts, have little significance in relation to the particular facts presented by this case, and thus do not present a conflict therewith. For example, a prosecution for rape, such as was involved in *Lovely* v. *United States,* 169 F. 2d 386 (C.A. 4), cited by petitioner (Pet. 12), manifestly presents quite different problems from that involved in the

[1] For a recent statement of the general rule by this Court see *Nye & Nissen* v. *United States,* 336 U.S. 613, 618.

present crime. There the court held excludable evidence of a rape not charged on the ground that the fact that one woman was raped had no tendency to prove that another woman did not consent. In some of the other cases cited, the courts found the evidence of other crimes inadmissible as having only a slight tendency to prove the crime charged [2] or on the ground that intent or scheme was not an element of the crime charged.[3] The cases cannot all be reconciled without strain for different courts may reach different conclusions on the admissibility of this type of evidence even on closely similar facts. This type of conflict is not, however, the kind which this Court can resolve for, although the general principles underlying the decision are established, so long as exercise of judgment is involved it is impossible to assure that such judgment will always be exercised in the same way by different judges.

The only question here is whether, on the particular facts of this case, the courts below could properly find that the evidence of other crimes did logically tend to prove the crime charged. As we have already shown, *supra* pp. 4, 5, the evidence of other crimes did serve the purpose of showing both

---

[2] *E.g.*, *Hartman* v. *United States*, 215 F. 2d 386, 394 (C.A. 8), where the prosecution for tax fraud charged a failure to report specific factual items; *Railton* v. *United States*, 127 F. 2d 691 (C.A. 5), where the only issue was identity.

[3] *United States* v. *Klass*, 166 F. 2d 373, 377 (C.A. 3), and *Kempe* v. *United States*, 151 F. 2d 680, 687 (C.A. 8), relating to sales at over-ceiling prices; *Hubby* v. *United States*, 150 F. 2d 165, 167 (C.A. 5), relating to sales of narcotics.

petitioner's purpose and his method of operation. It is significant that, in the most closely similar case that we have been able to find, another circuit court reached the same conclusion. *Brehm* v. *United States,* 196 F. 2d 769, 771 (C.A. D.C.), certiorari denied, 344 U.S. 838, where the defendant, a congressman, was convicted of receiving from a clerk in his office contributions for the political purpose of assisting him in financing his campaign for re-election as a representative. Evidence of similar contributions by another clerk on dates not charged in the indictment was held admissible, as it was in the instant case, to establish a common scheme (*id.* at 771; R. 93).

2. Petitioner's further assertion, that a detailed admission in evidence of other offenses placed him on trial for crimes not charged in the indictment (Pet. 2, 17), is without merit. If evidence of other offenses is to be introduced at all, the other crimes must be proved to make the evidence of any value. The record shows that the government did not indulge in unnecessary detail, in regard to the testimony of witnesses Beard (R. 78, 94-101) and Stuart (R. 129, 133-139, 158-160). Moreover, in charging the jury, the court said (R. 255):

> [Evidence of separate offenses, not alleged in the indictment], if believed by you, may be considered as tending to establish a common scheme or common purpose, so associated that proof of one tends to prove the other.
>
> Your responsibility, however, is to determine whether or not the defendant is guilty,

beyond a reasonable doubt, of the *offense charged in the indictment.* [Emphasis supplied.]

3. Petitioner contends (Pet. 3, 20) that the trial court should have declared a mistrial, *sua sponte,* when witness Birdsong testified, with respect to a disciplinary proceeding against him, "The Post Office Department sustained a charge against me of paying $400" (R. 17, *supra,* p. 4). The trial court sustained an objection to the testimony, had it stricken, and instructed the jury to disregard it (R. 17). Inasmuch as petitioner admittedly made no objection to this course in the trial court, and did not raise the point on appeal, his present contention that this was plain error requiring reversal is without merit. It must be presumed that the jury followed instructions. *Opper* v. *United States,* 348 U.S. 84, 95.

Petitioner claims the alleged prejudice was not cured by the instruction (Pet. 21) because another witness, Beard, subsequently testified that, at the time of petitioner's trial, he held a lower rated office than formerly (R. 95-96). Perhaps the jury could infer that Beard had been subjected to the same type of disciplinary procedure as Birdsong, although this is at best highly speculative. But since both Birdsong and Beard testified explicitly at the trial that each had paid $400 to petitioner for a promotion, the evidence as to disciplinary action by the Post Office on the basis of such payments added nothing of significance to their testimony.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1955.

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IN THE

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Reply Brief for Petitioner

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May It Please the Honorable Justices of the Supreme Court.

STATEMENT

The Brief for the United States in Opposition, following the excellent formula for such documents, described by Mr. F. B. Weiner as "always belittlin' " (*Cf.* Weiner, *Effective Appellate Advocacy* p. 296), makes four errors in attempting to convince this Court that there is nothing about this case which is of general importance or interest. These are:

(a) It assumes, contrary to settled principles, that the statute involved in this case requires proof of criminal intent (Br. 5);

(b) It assumes, contrary to fact, that a common scheme or design was involved in the offense charged (Br. 5);

(c) On the assumption that proof of other offenses was proper in this case, it misses the clear conflict with the rule enunciated in *Schwartz* v. *United States*, 160 F. 2d 718 (C.A. 9th, 1947) as to the extent to which such offenses could be proved (Br. 7), and

(d) It misconceives the impact upon the jury of testimony as to what allegedly had occurred and testimony that a respected governmental agency had investigated the matter and found that such actions had, in fact, occurred (Br. 9).

With these errors corrected, it is plain that the questions involved in this case should be considered by this Court.

ARGUMENT

1. The statute involved, 18 U.S.C. 215, requires merely proof of solicitation or reception, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person an appointive office or place under the United States. As applied to this case, the only proof required for conviction was that Petitioner had received the $400 from Birdsong and had promised, therefore, to attempt to obtain a promotion in the post office for Birdsong. Petitioner could not have defended this case by asserting lack of criminal intent because the statute does not require that the act be committed wilfully or contain any other language making such intent an element to be proved. The Court of Appeals for the Fifth Circuit described the test as to whether intent is an element of a statutory offense as follows at page 823 of its opinion in *Hargrove* v. *United States*, 67 F. 2d 820 (C.A. 5, 1933):

> "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces only its wilful doing. In the first class of cases, especially in those offenses *mala prohibita*, the law imputes the intent . . . . . In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it is of the essence."

In *United States* v. *Greenbaum*, 138 F. 2d 437, 438 (C.A. 3, 1943) the question of whether "criminal intent" is an element of the offense is said to be one of legislative intention, and where intent would be difficult to prove and the offense

is one which is capable of inflicting widespread injury, a legislative design to dispense with "criminal intent" as an element of the offense will be inferred.

Under both of these tests, the instant statute qualifies as one which does not require proof of intent for a conviction. It contains none of the language which has been construed as requiring proof of intent, and, manifestly, the preservation of the public belief in the integrity of public service is of sufficient importance that it should be so safeguarded as to be above a "breath of suspicion". Certainly, intent would be difficult to establish in such cases, and, therefore, Congress properly dispensed with it. As a result, the government's remarks concerning the authorities cited at pages 10 to 16 of the petition (Br. 6) are inapplicable, and there is a clear conflict between this case and *United States* v. *Klass,* 166 F. 2d 373 (C.A. 3, 1948).

2. The government asserts that the evidence of other offenses was proper for the purpose of establishing a common scheme (Br. 5). The indictment, however, charges no scheme (R. 3), and none of the government's evidence establishes such a scheme. All it shows, accepting it at face value, is that petitioner may have engaged in three different transactions.

3. The government asserts that it did not go into unnecessary detail in establishing the offenses involved in the testimony of the witnesses Beard and Stuart (Br. 8). How this can be said in view of the fact that, as was shown at pages 17 through 19 of the petition, their testimony, and the evidence offered to support it, was in as great detail as that of Birdsong himself. The net effect of this testimony was that defendant was called upon to offer complete defenses to three different crimes, only one of which was involved in the indictment, and actually was

tried for the commission of two additional offenses for which his conviction would not operate as a bar to subsequent prosecution.

4. Finally, the brief for the United States asserts that the error in permitting the jury to learn of the Post Office Department's hearings was cured because of the fact that Birdsong and Beard testified to the facts involved on the trial of this cause. However, on this trial, one of the issues was the credibility of Birdsong and Beard. To permit them to give their version of the facts was one thing and to permit a responsible and respected government agency to vouch for their credibility, by indirection, was another. It is this very effect which rendered the testimony concerning the Post Office hearings so prejudicial.

CONCLUSION.

Nothing in the Brief in Opposition shows any substantial reason why the arguments advanced in the petition are not good and cogent reasons for the granting of the relief prayed for therein. For this reason, as well as the reasons set forth in the petition, petitioner submits that the relief sought in this proceeding should be granted.

Respectfully submitted,

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